IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

OMAHA PACKING COMPANY,
Petitioner,

vs.

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY, AND THE ALTON RAILROAD COMPANY,
Respondents.

BRIEF IN SUPPORT OF PETITION.

Reference to Report of Opinion Below.

This case in the District Court was not reported. The opinion of the Circuit Court of Appeals for the Seventh Circuit has not yet been reported, but appears at pages 837-852 of the Record.

Grounds of Jurisdiction.

This Court has jurisdiction to order a Writ of Certiorari pursuant to the Act of February 13, 1925; 43 Stats. 938, ch. 229, § 1; 28 U. S. C. A. 347 amending and reenacting § 240 (a) of the Judicial Code.

Statement of the Case.

Because the case is fully stated there, reference is respectfully made to the "Summary Statement of the Matter Involved" in the Petition for Certiorari (*supra*, pp. 1-6, incl.) in support of which this brief is filed.

Errors to Be Urged.

1. The Court erred in holding that evidence of the physical cause of an injury is sufficient to deprive plaintiff of the right to rely on the doctrine of *res ipsa loquitur*, even though the responsible human cause (*i. e.*, the specific negligence) is not shown.

2. The Court erred in holding that there is a difference between the carrier-passenger situation and highly dangerous agency situation on the one hand and ordinary tort situations on the other so far as the application of the doctrine of *res ipsa loquitur* is concerned.

3. The Court erred in holding that the plaintiff tendered instruction No. VII based on the instruction approved by this Court in *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, would have permitted too broad an inference of negligence upon the facts of the case.

4. The Court erred in holding that in spite of the failure of the defendants to explain what had happened to the cotter key, the jury and the Court could speculate on the reason why it was missing without there being any burden on the defendants to explain the cause of its absence.

5. The Court erred in holding that a Federal trial judge is under no independent duty to supply correct instructions where requested instructions are technically defective.

ARGUMENT.

I.

To Deprive a Plaintiff of the Right to Rely on the Doctrine of Res Ipsa Loquitur, the Evidence Must Show More Than the Physical Cause of the Injury—It Must Show the Responsible Human Cause.

Since *Erie R. R.* v. *Tompkins*, 304 U. S. 64, the policy of Federal courts has been to endeavor to secure the same result from litigation in a Federal court as would be obtained from litigation in a state court, by applying all of the state rules of substantive law. Just as the incidence of burden of proof is a question of substantive law (*Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208), *res ipsa loquitur*, which affects the incidence of the burden of going forward with the evidence, is a question of substantive law, and so to be determined by local law.

Sierocinski v. *E. I. duPont etc. Co.*, 118 F. (2d) 531, 534-535 (3 C. C. A.).

F. W. Martin & Co. v. *Cobb*, 110 F. (2d) 159, 163 (8 C. C. A.).

Hagan and Cushing Co. v. *Washington etc. Co.*, 99 F. (2d) 614, 616 (9 C. C. A.).

Coca Cola etc. Co. v. *Munn*, 99 F. (2d) 190, 193 (4 C. C. A.).

The essence of this case is the ruling of the trial court and the Circuit Court of Appeals that proof of the precise mechanical or physical cause of an injury will deprive a plaintiff of his right to rely on the doctrine of *res ipsa loquitur* (844-847). We do not believe that the Illinois

courts would have applied that rule in the instant case.[5] No Illinois case holds that proof of the precise mechanical or physical cause of an accident will deprive a plaintiff of the right to rely on the doctrine of *res ipsa loquitur*. The language of the Illinois decisions is that it is evidence of "specific negligence" that deprives a plaintiff of that right. Thus in *Bollenbach* v. *Bloomenthal*, 341 Ill. 539, 546, the court in distinguishing another case says:

> "Thus specific negligence was shown and the doctrine of *res ipsa loquitur* does not apply where there is evidence of specific negligence."

And in *O'Rourke* v. *Marshall Field & Co.*, 307 Ill. 197, 200, the Illinois Supreme Court says of the doctrine of *res ipsa loquitur:*

> "It does not apply where there is evidence of specific negligence."

In the cases of *Chicago City Ry. Co.* v. *Carroll*, 206 Ill. 318, and *Masten* v. *Cousins*, 216 Ill. App. 268, the Court applied the doctrine of *res ipsa loquitur*, although the language of each opinion indicates that the Court felt that there was some evidence of specific negligence for the consideration of the jury.

The Supreme Court of Illinois in *Wheeler* v. *Chicago etc. R. R. Co.*, 267 Ill. 306, 321, adopted the words of Mr. Justice Holmes, in *Schlemmer* v. *Buffalo etc. R. Co.*, 205 U. S. 1, 12, as follows:

> "*Negligence consists in conduct which* common experience or the special knowledge of *the actor* shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he *is held answerable for* that result although it was not certain, intended or foreseen." (Italics ours.)

So the law of Illinois, as of the Federal courts, makes

5. The great weight of authority supports the rule that neither proof of the precise physical cause of a plaintiff's injuries, nor an unsuccessful attempt by plaintiff to prove the specific negligence of the defendant, will deprive a plaintiff of his right. For list of authorities, see Appendix B (*infra*, p. 30).

human conduct rather than mechanical or physical conditions, the criterion of negligence.

To say, therefore, as the Circuit Court of Appeals does (846), that because the "precise cause" of the occurrence is shown by petitioner, the doctrine of *res ipsa loquitur* is not applicable (847), is to look only at the mechanical cause (the absence of the cotter key), not at the responsible human cause (what act or omission caused the absence of the cotter key), which alone is determinative of the question of negligence or non-negligence.

Every decision as to whether a defendant's conduct in particular circumstances is negligent involves two questions, viz: (1) exactly what did defendant's conduct consist of; or otherwise phrased—exactly what did defendant do or fail to do in the particular set of circumstances in question, and (2) was defendant's conduct such as complies with the legal standard of such care as a reasonably prudent man would exercise in similar circumstances? (Holmes, The Common Law, p. 122.) If the first question is answered beyond dispute, the second may be a question for the court, or for the jury. If reasonable men must agree that defendant's conduct in question is either a violation of, or a compliance with, the standard of care, the question is for the court. If reasonable men might disagree as to whether defendant's conduct in question was a violation of the legal standard of care, the jury must settle that point.

Restatement of Torts, § 285.
Holmes, The Common Law, pp. 122-123.

In a *res ipsa loquitur* case, the defendant's exclusive control of the instrumentality causing the damage and the fact that such damage does not occur in the ordinary course of things, if the one in charge of the instrumentality uses due care, unite in creating an inference of negligence, in the absence of a showing by defendant that his conduct in

the particular circumstances was not negligent. Where the facts of the case create this inference the jury should be told of it so that they may weigh the facts intelligently against the defendant's explanation.

Burdette v. *Chicago Auditorium Ass'n.*, 166 Ill. App. 186, 190.

Gleeson v. *Virginia Midland R. Co.*, 140 U. S. 435, 445.

Lowery v. *Hocking Valley R. Co.*, 60 F. (2d) 78, 79 (6 C. C. A.).

In the instant case, the facts obviously brought the case within the doctrine of *res ipsa loquitur* when the failure of the bridge to rise was shown, and this the Circuit Court of Appeals admits (844).

Petitioner made stronger proof, viz: that the failure of the bridge to rise was due to the fact that a cotter key was not present in a bronze wrist pin which connected two parts of the control mechanism inside a sealed lever box (165). At that point, the mechanical or physical cause of the failure of the bridge to rise was shown, but there was no light on the vital question of what was the responsible human act or omission which resulted in the absence of the cotter key from its proper position. Here the doctrine of *res ipsa loquitur* should apply, for certainly the absence of the cotter key from its proper position, in something so exclusively in respondents' control as the contents of a padlocked lever box, calls for explanation by respondents. Respondents' evidence was to the effect that the control machinery was standard equipment on American railroads, and that the lever box was inspected once each week, the last time a week before its failure. From these facts, respondents argued that the cotter key broke, and the Circuit Court of Appeals accepted this, saying (850):

> "We agree with the defendants that the most reasonable hypothesis is that it broke, some time subsequent to the last inspection, as a result of some defect not readily ascertainable by the inspector."

This explanation is negatived by the fact that if the cotter key had broken, *its fragments would have been on the floor of the locked lever box*, and respondents could have produced them to show that the breaking really happened, instead of having to argue it as the "most reasonable hypothesis." The failure to produce these fragments compels the acceptance of some other valid inference, the most probable of which is that some employee of respondents, having the key to the lever box, opened the box after its last inspection, removed the cotter key for some purpose and carelessly either (a) failed to place a new cotter key in the hole in the wrist pin, or (b) after placing a cotter key in the hole in the wrist pin, failed to clinch (spread the free ends of) the cotter key, either of which would be negligence under the laws of Illinois.

Rotche v. *Buick Motor Co.*, 358 Ill. 507, 515.

Chihocki saw a cotter key in the possession of Preston, respondents' employee, in the leverman's shanty after the bridge had gone up, but he could not say this cotter key was the one which was missing from the brass pin (170). Respondents did not (a) introduce any evidence that they could not produce the missing cotter key, (b) produce the missing cotter key or fragments thereof, or (c) put Preston on the stand.

Moreover, in *res ipsa loquitur* cases, the physical cause of the plaintiff's injuries is generally shown quite clearly by the evidence, and the question then becomes, what was the human act or omission which produced the physical cause, and was that act or omission a violation of the legal standard of care.

In *Byrne* v. *Boadle*, 2 H. & C. 722, the physical cause of plaintiff's injury was clear—a barrel of flour fell on him from an opening in defendant's warehouse. In *Gleeson* v. *Virginia Midland R. Co.*, 140 U. S. 435, the precise physical cause of the injury was shown—a landslide which derailed

a train. In *San Juan Light & Transit Co.* v. *Requena*, 224 U. S. 89, the precise physical cause of the death of plaintiff's intestate was shown—electric shock from defective converters. Yet in each of these cases, the doctrine of *res ipsa loquitur* was applied because the responsible human cause behind the precise physical cause was not shown.

In *Soto* v. *Spring Valley Water Co.*, 39 Cal. App. 187, the precise physical cause of the death of plaintiff's intestate was shown—the breaking of a chain which let the scoop of a steam shovel fall on him. In respect to the contention adopted by the Circuit Court of Appeals in this case, the court in the *Soto* case said (178 Pac. at 306) in part:

> "Defendant * * * contends that the *evidence showed the specific cause of the accident*, and that therefore the maxim may not be invoked, and certain authorities are cited which are claimed to support this contention. We think, however, that this question is foreclosed in this state by the doctrine of the case of *Lippert* v. *Pacific Sugar Corporation*, 33 Cal. App. 198, 164 Pac. 810. It may be added that in this case *the real moving cause of this accident is now shown. It is true that it appears that the scraper, for some reason, was dragged too far by the cable, thus wrecking the timbers, but this is only the result of some other cause, which must have been the underlying reason for the accident.* This underlying cause is not proven but it does seem to us that nothing could be clearer than that somebody's carelessness must have caused it." (Italics ours.)

In *Churchill* v. *Baltimore & O. R. Co.*, 30 F. Supp. 792, (D. C. W. D. Pa.) the evidence showed "that the brake rigging of the particular car which bumped into the car on which plaintiff was riding was defective, loose, and dangling, that a certain cotter pin that held up the brake rigging was missing" (30 F. Supp. at 792). But in spite of the particularity of this proof, the court in that case held that the doctrine of *res ipsa loquitur* applied.

Respondents' evidence in exculpation of its conduct is, in this case, entirely unsatisfactory. Not only did they fail to produce the "hypothetical" fragments of the missing cotter key, but the evidence was not as complete as respondents could have produced in other respects. Thus, respondents made no attempt to produce the lever men who were on duty when Pavelchik, a relief lever man (101, 156), was not. Respondents made no effort to prove that no employee of theirs went into lever box No. 3 subsequent to the time when Heitz made his last inspection prior to August 4, 1932, although if such were a fact, respondents could have made such proof by calling the lever men who were on duty other than at times when Pavelchik was on duty, or if necessary, by calling employees who had keys to the padlock on lever box No. 3 and ascertaining from each whether he had gone into the lever box between the time of the inspection by Heitz and the time of the occurrence in question. Respondents' studious non-production of this evidence, which was within its power to produce, justifies the inference that if respondents had produced the testimony it would not have helped their case.

Page v. *Keeves*, 362 Ill. 64, 73.

Interstate Circuit, Inc. v. *United States*, 306 U. S. 208, 226.

So the evidence neither showed what human conduct caused the absence of the cotter key, nor rebutted the inference of respondents' negligence.

The doctrine of *res ipsa loquitur* has never been more widely and usefully employed to promote justice than at the present time. In its opinion below, the Circuit Court of Appeals, by failing to observe the distinction between the precise physical cause of damages, and the responsible human cause (*i. e.*, the specific negligence), and holding that proof of the precise mechanical cause deprives the plaintiff of the right to rely on the doctrine, has seriously limited the doctrine of *res ipsa loquitur*, and drastically

impaired its usefulness at a time when its function in the judicial system is more than ever urgently needed, and limitations upon it consequently are most unfortunate. No Illinois case requires such a limitation—on the contrary, the language of the Illinois decisions cited negatives the limitations imposed by the Circuit Court of Appeals. This Court should take jurisdiction to correct this serious fallacy in the opinion of the court below.

II.

The Illinois Law Is That There Is No Difference, So Far as Application of the Doctrine of Res Ipsa Loquitur Is Concerned, Between Carrier-Passenger and Dangerous Agency Cases on the One Hand, and Simple Negligence Cases on the Other.

The Circuit Court of Appeals attempted to distinguish certain Illinois cases on the ground (847) that carrier-passenger cases and dangerous agency cases stand on some different basis, with respect to the doctrine of *res ipsa loquitur,* than ordinary torts cases. But that is an improper distinction according to the Illinois law, under which the case of a passenger injured by defective machinery or improper handling thereof, is simply one application of the doctrine of *res ipsa loquitur.* In *Chicago City Ry.* v. *Carroll,* 206 Ill. 318, 323, the Court said, speaking of the defendant's duty of explanation in carrier-passenger cases:

> "*It is the general recognized rule of this country and is one application of the rule of res ipsa loquitur.*" (Italics ours.)

And in *North Chicago Street Railway* v. *Cotton,* 140 Ill. 486, 494, the Court says, concerning the *res ipsa loquitur* doctrine:

> "* * * and this is held to be the rule even where no special relation like that of passenger and carrier, exists between the parties."

This is in accord with the general weight of authority.

Lee Line Steamers v. *Robinson*, 218 F. 559, 564 (6 C. C. A.).

Griffin v. *Manice*, 166 N. Y. 188, 193.

Southland Greyhound Lines v. *Frausto*, 69 S. W. (2d) 497, 499, 500 (Texas Civil Appeals).

3 Cooley on Torts, 4th Ed. p. 381.

Harper on Torts, p. 183.

In holding that there is a different basis for the doctrine of *res ipsa loquitur* in carrier-passenger cases than in other cases, the Circuit Court of Appeals clearly failed to apply the local law on a vitally important point.

III.

The Circuit Court of Appeals Erroneously Held That, in a Res Ipsa Loquitur Case, the Evidence Must Exclude Causes Other Than Defendant's Negligence.

The opinion of the Circuit Court of Appeals in this case adds to the confusion of the *res ipsa loquitur* decisions by holding (850) that the doctrine of *res ipsa loquitur* is inapplicable because the absence of the cotter key was as consistent with ordinary care as with negligence. In so holding, the Circuit Court of Appeals was confusing proof by circumstantial evidence with *res ipsa loquitur*. It is true that in proving an action for specific negligence by circumstantial evidence, the facts established must be such that negligence is the only conclusion than can reasonably be drawn from them. *United States etc. Co.* v. *Des Moines Nat. Bank*, 145 Fed. 273, 279 (8 C. C. A.; Van Devanter, *J.*) But in a *res ipsa loquitur* case, all that is necessary is for plaintiff to make a prima facie case, for the defendant has an opportunity to show that the accident occurred from a cause not due to his negligence. If this were not so, it would be impossible to justify the rule that a *res ipsa*

loquitur case "warrants, but does not compel," an inference of negligence (*Sweeney* v. *Erving*, 228 U. S. 233, 240). And so the cases which have seriously adverted to this point hold (contrary to the opinion of the Circuit Court of Appeals in this case), that it is not necessary, in a *res ipsa loquitur* case, for plaintiff's evidence to exclude all possibilities except defendant's negligence as a cause of the injury.

Cincinnati etc. R. Co. v. *South Fork Coal Co.*, 139 Fed. 528 (6 C. C. A.; Lurton, *J.*).

Clarke v. *Nassau El. R. Co.*, 9 App. Div. 51, 41 N. Y. S. 78, 80 (Cullen and Bartlett, *JJ.*).

Hubbert v. *Aztec Brewing Co.*, 26 Cal. App. (2d) 664, 80 P. (2d) 185, 1016, 1018.

To make a prima facie case under the *res ipsa loquitur* doctrine, it is sufficient to show that the instrumentality causing plaintiff's injury was in the exclusive control of the defendant, and that the "accident" was such as, in the ordinary course of things, does not happen if those in charge of the instrumentality use ordinary care (*Chicago City Ry. Co.* v. *Barker*, 209 Ill. 321, 326) and it then devolves upon the defendant to show that the injury occurred without any negligence on his part. It is not necessary to exclude all causes of the injury other than defendant's negligence, as in the circumstantial evidence cases.

IV.

Petitioner's Tendered Instruction No. VII Did Not Authorize the Jury to Draw Any Inference of Negligence Not Warranted by the Evidence.

The Circuit Court of Appeals also justified its affirmance of the trial court's refusal to give petitioner's requested instruction No. VII on the ground that it was too broad, and would have permitted "an inference of negligence * * * as to anything that occurred in connection with the inspection and maintenance of the bridge" (851). The Circuit Court of Appeals accepts, as the law of Illinois, that the inference of negligence under the doctrine of *res ipsa loquitur* is one of general and not of specific negligence (848), saying "The doctrine, however, raises an inference of general negligence with respect to the instrumentality (the bridge)". The Circuit Court of Appeals then arbitrarily ignored the limitation put on the inference of general negligence in the requested instruction by the following words "unless upon the whole evidence such inference was rebutted" (536). By the quoted words, the jury would have been told that they should refuse to draw the inference as to the machinery generally, or as to any part thereof, unless the inference was warranted by the whole evidence.

Petitioner's requested instruction No. VII was a paraphrase of the instruction approved by this Court in a *res ipsa loquitur* case—viz.:

> *Inland and Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 554.

For the Court's convenience in comparing them, the instruction approved in the *Tolson* case, and petitioner's

requested instruction No. VII are set forth in parallel columns:

Petitioner's Instruction:

"It is admitted that the Stewart Avenue Bridge was, on the 4th day of August, 1932, in the control and management of the defendants. If the jury believe, from a preponderance of the evidence, that on said 4th day of August, 1932, said bridge failed to open promptly upon receiving a proper signal therefor from the fireboat Graeme Stewart, and that such failure to open promptly does not happen in the ordinary course of things, if those in charge of the management and operation of the bridge use ordinary care in connection with its inspection and maintenance, *this would be prima facie evidence of negligence on the part of the defendants under the circumstances and would justify the jury in so finding, unless upon the whole evidence, such prima facie evidence is rebutted.*" (536)

Instruction in Tolson Case:

"If the Jury believe from the evidence that the wharf in question was an ordinarily strong and good one, and suitable for the purpose for which it was constructed, and that, in making the landing in question, the boat was thrown against the wharf with such force as to tear up some of the planks or boards of the flooring, *this would be prima facie evidence of negligence on the part of the agents of the defendant under the circumstances* in making such landing *and would justify the jury in so finding unless upon the whole evidence such prima facie evidence is rebutted.*" (139 U. S. at 554. Italics ours.)

If *Inland etc. Co.* v. *Tolson*, 139 U. S. 551, is no longer a safe guide for counsel in framing instructions, this Court should expressly overrule it.

V.

A Federal Judge Is Not a Mere Moderator, and If the Only Instruction Requested on a Material Point Is Technically Defective, He Should Give a Correct One.

Finally, the Circuit Court of Appeals held (852) that a Federal court "is under no independent duty to supply correct instructions where requests are defective."

In *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95, Chief Justice Hughes said, "In a trial by jury in Federal Court

the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."

In *St. Paul etc. Co.* v. *Bachman,* 285 U. S. 112, at 118, 119, this Court held that if instructions submitted on an issue were technically incorrect, but were sufficient to direct the trial court's attention to the particular point or issue, it was the trial court's duty to give a correct instruction on such point or issue. The Court cited a number of Circuit Court of Appeals cases in support of its decision, which upheld a different rule than that adopted by the Circuit Court of Appeals in the next to the last paragraph of its opinion in this case.

The duty of a Federal Judge under these circumstances is an extremely important question of Federal law. We submit that the decision of the Circuit Court of Appeals in this case is at variance not only with the decision of this Court in *St. Paul etc. Co.* v. *Bachman,* 285 U. S. 112, but with the decisions of the Circuit Courts of Appeal of the 3rd, 4th, 5th and 6th Circuits on this point.

Sprinkle v. *Davis,* 104 F. (2d) 487 (4 C. C. A.).

Audubon Building Co. v. *F. M. Andrews & Co.,* 187 F. 254, 260 (5 C. C. A.).

Memphis etc. Co. v. *Chapman,* 62 F. (2d) 565, 567 (6 C. C. A.).

Westchester Fire Ins. Co. v. *Fitzpatrick,* 2 F. (2d) 651, 654 (3 C. C. A.).

Sutherland v. *Payne,* 274 F. 360, 361 (6 C. C. A.).

Conclusion.

Twenty-eight years have passed since this Court last discussed the doctrine of *res ipsa loquitur* in *Sweeney* v. *Erving,* 228 U. S. 233. In that time, a tremendous number of decisions have been handed down by other courts re-

lating to this doctrine. During that period the wider use of machinery in industry, with the increase in injuries resulting therefrom, has correspondingly increased the importance of the doctrine. In cases of that type, the machinery causing the injury is in the exclusive control of the defendant, and the "accident" is such as does not happen in the ordinary course of things if those in charge of the machinery use due care. The injured plaintiff has little or no means of showing in what specific way the defendant's conduct was negligent, *i. e.*, what human act or omission started the chain of events resulting in his injury. The doctrine of *res ipsa loquitur* authorizes the jury to draw from those circumstances, in the absence of explanation, the inference that the defendant was negligent. The Illinois courts have applied the doctrine liberally to the fact situations presented to them, and often it is only plaintiff's ability to invoke that doctrine which enables him to secure the redress to which he is entitled.

The opinion of the Circuit Court of Appeals in this case has placed unwarranted limitations and restrictions upon the doctrine of *res ipsa loquitur* and the mechanics of its operation and has hopelessly confused the law by holding that a showing of the physical cause of an accident deprives a plaintiff of the right to rely on that doctrine; and the opinion below does not apply the Illinois law which requires a showing of specific negligence, viz.: a human act or omission responsible for the injury, before a plaintiff is deprived of the right to rely on the doctrine.

The Circuit Court of Appeals in its opinion in this case, both decided questions of local law in a way probably contrary to applicable local decisions and also decided important questions of Federal law in a way probably in

conflict with the decisions of this Court. For these reasons, this Court should exercise its discretion to issue its Writ of Certiorari to review this cause.

Respectfully submitted,

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